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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In re Application of)

WILBURN INDUSTRIES, INC.)

File No. BPH-911230MC

Application for Construction)
Permit for a new FM station,)
Channel 280A, Westerville, Ohio)

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To: Chief, Mass Media Bureau

OPPOSITION TO FM EXAMINERS
PETITION TO DENY AND DISMISS

Wilburn Industries, Inc. ("Wilburn"), by its attorneys,
~~properly submits its opposition to the "Petition to Deny and~~

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then operated with such ERP pursuant to automatic program test authority until its renewal application was denied. Wilburn has proposed to operate using the previously licensed WBBY-FM technical facilities and with a power comparable to that previously authorized to WBBY-FM.¹

ORA alleges that Wilburn's application must be denied or dismissed because ORA has proposed to operate from a fully spaced site while Wilburn will operate from the WBBY-FM site which is

ORA's arguments must be rejected and its Petition denied. Simply put, ORA has mischaracterized the Commission rules and precedent upon which it relies, and it fails to understand the Commission policies which such rules and precedent reflect.

As an initial matter, it is incorrect and overly simplistic to state, as ORA has, that the application of any applicant which has specified a site which is short-spaced under the current rules must be dismissed if another, mutually-exclusive applicant has specified a fully-spaced site. Rather, as the cases cited by ORA indicate, a short-spaced applicant will be dismissed in such circumstances if a waiver of the spacing rules is required. Where no waiver is required, as is the case with Wilburn, there is no basis for dismissal.³ Stated otherwise, an application will not be dismissed, whether or not it is short-spaced under

²(...continued)
an issue because the map depicting Wilburn's 70 dBu contour does not clearly indicate that city-grade coverage would be provided to 80% or more of Westerville. (Petition, p. 4-5.) To support this proposition, ORA cites Port St. Lucie Broadcasting, Limited Partnership, 6 FCC Rcd 2063 (MMB 1991) and Pearce Broadcasting Partnership, 6 FCC Rcd 5775 (MMB 1991).

³ The rationale for such policy also is made clear by such precedent. Where waiver of the spacing rules would be granted only after a threshold showing was made that no fully spaced site was available, the specification of a fully spaced site by another applicant constituted proof that such a threshold showing could not be made. In such circumstances, the Commission reasonably concluded, there was no need to conduct a full evidentiary hearing to determine whether a waiver should be granted.

revised Section 73.207 of the Rules, if it is fully consistent with Commission regulations and no waiver is necessary.

In this regard, it also is clear that ORA has attempted to constrict Section 73.213 and the Commission's language in MM Docket No. 88-375 beyond that either indicated or intended.⁴ As implicitly recognized by the Commission when it accepted Wilburn's application for filing, the Commission treats applications to replace previously-authorized facilities comparably to applications to renew or modify such facilities. Thus, the language of the Commission in MM Docket No. 88-375, cited by ORA at page 3 of its Petition, patently addresses only those situations where petitions to allot new channels were pending at the time that the Commission's newer spacing requirements became effective. In such circumstances, the Commission reasonably and fairly concluded, an application which later proposed to operate at the reference point specified for such channel would not have to meet the newer spacing requirements if the short-spacing in question: (a) did not exist at time that the allotment was requested, but (b) arose when -- and only because -- the newer rules became effective. The same policy underlay the Commission's decision to adopt Section 73.213 and thereby thus allow stations to improve their facilities where

⁴ ORA also misstates the language of that Rule. Section 73.213(a) does not, for example, explicitly refer to "authorized stations," as ORA asserts. It instead refers to "authorized locations," such as the WBBY-FM transmitter site which Wilburn intends to utilize.

such facilities initially were fully spaced but then became short-spaced when the Commission revised its rules. Although the Commission did not specifically address the special, rare circumstances of a case such as the instant one, where operation on an allotment is terminated and then reinstated, the same policy obviously and reasonably would apply in such instances. That is, where the reference point of an allotment was fully spaced when the allotment was made and the station was constructed and became short-spaced only by virtue of the newer spacing rules, an applicant which proposes to replace a pre-existing facility on that channel may still apply for a station to operate at such reference point. Whether or not a "new" station is being applied for, there is no sound reason -- and ORA has advanced no reason -- to distinguish between a pre-existing facility which operates at a channel reference point and facilities which will be substituted for such a station.

Indeed, to treat such applicants as if they were new applicants on previously unused allotments would itself be unreasonable and contrary to well-established Commission policies. For example, because the transmitter location of an operating station becomes the reference point of the frequency used by the station, the Commission (under ORA's theory) would have to dismiss applications which were filed on the specific reference point of the allotment. This would be both unprecedented and unjustified -- and would effectively convulse

the Commission's overall allotment and application processes. Further, the Commission would be dismissing applications for an allotment where no notice of a site restriction had been given, which would in itself render such action legally questionable. Most critically, the results of ORA's theory would be untenable: in certain circumstances, where a long-established Class A station lost its license, it might be that no replacement facility could be applied for. Even more untenable would be a circumstance where a renewal applicant might be "grandfathered" and all mutually exclusive applicants to replace that facility might be deemed "new" and so be dismissed even where they proposed to operate essentially similar technical facilities. The logical extension of ORA's theory thus makes it patent that such theory has no basis in either law or logic. As reflected by the fact that Wilburn's application was accepted for filing, Wilburn reasonably and correctly relied upon and complied with Section 73.213 of the Commission's Rules when it filed for the frequency which had been vacated by WBBY-FM. ORA's sophistic attempt to stretch the Commission's language and intent so as to

require the denial or dismissal of Wilburn's application accordingly must be rejected.⁵

Respectfully submitted,

WILBURN INDUSTRIES, INC.



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⁵ ORA's request to specify a city-grade coverage issue against Wilburn may be dismissed as an improper pre-designation petition to enlarge issues. In any event, no special showing or request for waiver is required where Wilburn has been advised that its city-grade signal will encompass at least 80% of the community of license. Accordingly, and as plainly shown by the cases cited by ORA in its Petition, issues will be specified only where it has been shown that 80% of the community will not be so encompassed. ORA did not even attempt to make such showing and thus meet its



CERTIFICATE OF SERVICE

I, Andrea Sumner, a secretary at the law firm of Brown Finn & Nietert, Chartered, do hereby certify that I have, this 9th day of April, 1992, mailed, via first-class U.S. Mail, postage prepaid, a copy of the foregoing "OPPOSITION TO PETITION TO DENY OR DISMISS" to the following:

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